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In The

Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,
Petitioner,

v.

LEROY CARHART, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

Brief Amicus Curiae of the Horatio R. Storer Foundation, Inc., in Support of Petitioner

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INTEREST OF THE *AMICUS CURIAE*

Horatio R. Storer Foundation, Inc., is a nonprofit (IRC § 501(c)(3)) Oklahoma corporation organized to provide the public with educational materials on fetal development, abortion, persons with disabilities, and euthanasia; to educate the general public to respect all human life; and to provide positive alternatives to the solution of social, emotional, medical, and personal problems of women. The Foundation's present interest is the protection of infants, women, the medical profession, and the public from the effects of the harmful actions proscribed by the challenged Act.[1]

Consent to file this Brief was secured pursuant to Supreme Court Rule 37.3(a) from counsel for all parties, and copies of their letters of consent accompany filing of this brief.

SUMMARY OF THE ARGUMENT

The federal Partial-Birth Abortion Act of 2003 is different from the Nebraska partial-birth abortion ban at issue in *Stenberg v. Carhart*, 530 U.S. 914 (2000), in an important way: The Act bans killing the fetus after the fetal head or trunk-to-navel has emerged from the maternal body, while the law at issue in *Stenberg* banned killing the fetus after some portion of the fetal body had emerged from the uterus and entered the vagina. Crucially, the Act now before the Court applies only when the fetus has substantially emerged from the maternal body.

Congress claims a heightened interest in protection of the fetus at issue here precisely because the fetus has so

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[1]Pursuant to Supreme Court Rule 37.6, this brief was entirely authored by Counsel for the Horatio R. Storer Foundation, Inc.; the Alliance Defense Fund, Inc., made a monetary contribution toward preparation of the brief.

separated from the maternal body that he or she begins to take on the indicia of constitutional personhood attached to live birth. Indeed, Congress explicitly claims a *compelling* interest protection of the fetus in the Act and in its legislative history based on the new locational status of the fetus quite apart from any compelling interest it might claim based on "viability" or the capacity of the fetus to continue to survive apart from the maternal body. Congress similarly claims a compelling interest in protection of the substantially born fetus based on its interest in protecting against infanticide, since a human being who has substantially emerged from a maternal body is as much a human "infant" as a human "fetus," and should be protected as such.

To the degree that the fetus has emerged from the maternal body is also to the degree that any claim to a "right to privacy" or personal liberty to abortion diminishes. Termination of pregnancy is virtually complete when the Act takes effect, and the constitutional weight of any right that might be asserted on its behalf is virtually reduced by half when the head or trunk-to-navel of the fetus have emerged from the body of the mother.

When compelling interests in protection of the emergent fetus and in protection against infanticide are weighed against any severely diminished liberty or privacy interest in terminating pregnancy at stake in the abortions banned by the Act, the governmental interest in sustaining the Act should obviously prevail, at least in the absence of a showing of some significant maternal health interest that supports killing the substantially born fetus.

In evaluating any impact on maternal health, it is to be noted that the number of abortions affected by the Act is substantially reduced by the fact that it only applies to killing the fetus that has substantially emerged from the maternal body. Moreover, any generalized burden or health risk from

continued pregnancy is necessarily diminished by the fact that pregnancy is virtually terminated when the Act takes effect. Finally and crucially, the Attorney General's construction of the Act requires proof of specific intent to perform all the elements of the Act at the outset of the procedure. This means that, in order to demonstrate that the Act imposes a significant maternal health risk, it must be shown that some special risk to maternal health exists when physicians are forbidden to *specifically intend* to plan to deliver a fetal head or trunk-to-navel outside the maternal body in order to then kill the fetus. Your Amicus was unable to find any such specific evidence in the record.

The plain language of the Act and the Attorney General's construction of the Act requires proof of specific intent to conduct a partial delivery of the fetus outside the maternal body with specific intent to then kill the fetus. This obviously precludes application to D&E abortions, which are not performed with specific intent to delivery a head or trunk-to-naval outside the maternal body in order to then kill the fetus, but with intent to dismember the fetus without regard to the location of the fetus.

ARGUMENT

Your Amicus, the Horatio R. Storer Foundation, Inc., argues that the court of appeals erred in one important respect in striking down the Partial-Birth Abortion Act of 2003, Pub. L. No. 108-105, 117 Stat. 1201, 18 U.S.C. § 1531 (the "Act"): It misapprehended the nature of the governmental interests at stake in banning partial-birth abortions, neglecting to recognize an enhanced – indeed, compelling – governmental interest in guarding against infanticide and in protection of the fetus whose head or trunk-beyond-navel have entirely emerged from the body of the mother. In addition, your Amicus argues that the district court wrongly construed the Act to forbid some forms of abortion other than the partial-birth or intact dilation

and extraction (D&X) procedure, including the dilation and evacuation (D&E) procedures.[2]

The court of appeals' error equates abortions performed entirely within the body of a woman with procedures specifically intended to kill the fetus that has substantially emerged from the maternal body, and it failed to recognized that an enhanced governmental interest in protection of the fetus that has emerged from the maternal body trumps any insubstantial maternal health risk posed by the Act. The district court's error blurs the clear distinction the Act draws between the partial-birth procedure that the Act proscribes and the dilation and evacuation abortion procedure.

I. Compelling Governmental Interests in Protection of the Partially Born Fetus and in Preventing Infanticide Support the Act's Constitutionality.

The Act forbids delivering and killing a fetus only when, "in the case of a head-first presentation, the *entire fetal head is outside the body of the mother*, or, in the case of breech presentation, any part of the *fetal trunk past the navel is outside the body of the mother*." 18 U.S.C. § 1531(b)(1) (emphasis added). In this regard, the Act is fundamentally different than the Nebraska statute at issue in *Stenberg v. Carhart*, 530 U.S. 914 (2000), which proscribed "delivering *into the vagina* a living unborn child, or a substantial portion thereof," for the

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[2] *Carhart v. Ashcroft*, 331 F. Supp. 2d 805, 1030-38 (D. Neb. 2004). The court of appeals did not reach Respondents' claim that the Act encompasses procedures other than the D&X procedure because it held that this was unnecessary in light of its decision holding the Act unconstitutional for lack of a "health" exception. *Carhart v. Gonzales*, 413 F.3d 791 (8th Cir. 2005). Assuming the Respondents argue that the Act should be held unconstitutional on the alternative ground that it imposes an undue burden on performance of non-D&X abortion, it would be proper for this Court to address this claim here as it addressed a similar claim in *Stenberg v. Carhart*, 530 U.S. 914, 938-41 (2000).

purpose of killing the unborn child. *Id.* at 938 (*quoting* Neb. Stat. Ann. § 28-326(9) (Supp. 1999) (emphasis added)). That is, the Act applies only when a fetus is killed after having substantially emerged from the maternal body, while the Nebraska statute imposed no such requirement. As Judge Straub of the Second Circuit observed in analyzing the Act,

> The first significant difference between the two statutes is that the Act proscribes the destruction of the fetus at a location later than the one considered by the Court in *Stenberg*. The Nebraska statute criminalized "partial-birth abortions" that could have occurred completely within the body of the mother. *See* Neb. Rev. Stat. Ann. § 28-328(1) (Supp. 1999) (prohibiting a physician from "deliberately and intentionally *delivering into the vagina* a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child and does kill the unborn child" (emphasis added)), *quoted in Stenberg*, 530 U.S. at 922; *see also Carhart v. Stenberg*, 11 F. Supp. 2d 1099, 1118 (D. Neb. 1998) (medical expert testifying that "the phrase 'delivering into the vagina a living unborn child' in the definition of 'partial-birth abortion' . . . mean[s] to 'pull the fetus [from within the uterus and through the cervix and] down into the vagina,' but not necessarily outside of the woman's body'"), *aff'd*, 192 F.3d 1142 (8th Cir. 1999), *aff'd*, 530 U.S. 914, 120 S. Ct. 2597, 147 L. Ed. 2d 743 (2000). In this respect, the Nebraska statute impacted not only a woman's fundamental liberty and autonomy concerning the "decision whether to bear or beget a child,"

> *Casey*, 505 U.S. at 851, but also the very "integrity" of her body, *id.* at 896.

National Abortion Federation v. Gonzales, 437 F.3d 278, 310-11 (2d Cir. 2005) (Straub, J., dissenting).

The Act thus presents an entirely new and distinct issue and implicates an entirely different standard of review because it applies only when the fetus has substantially emerged from the maternal body. In altering the location of the fetus when the federal ban on partial-birth abortion applies, Congress clearly intended to assert a new heightened and, indeed, compelling governmental interest in protection of the fetus that has in fact partially emerged from the maternal body quite apart from any compelling interest that might exist after the fetus is capable of sustained life outside the maternal body – that is, apart from whether the fetus is "viable." Thus, Congress specifically stated in its findings concerning the Act:

> Based upon Roe v. Wade, 410 U.S. 113 (1973) and Planned Parenthood v. Casey, 505 U.S. 833 (1992), a governmental interest in protecting the life of a child during the delivery process arises by virtue of the fact that during a partial-birth abortion, labor is induced and the birth process has begun. This distinction was recognized in Roe when the Court noted, without comment, that the Texas parturition statute, which prohibited one from killing a child "in a state of being born and before actual birth," was not under attack. *This interest becomes compelling as the child emerges from the maternal body.* A child that is completely born is a full, legal person entitled to constitutional protections afforded a "person" under the United States Constitution. Partial-birth abortions involve the killing of a child that is in the process, in fact

> mere inches away from, becoming a "person". Thus, the government has a heightened interest in protecting the life of the partially-born child.

Public Law 108-105, 117 Stat. 1201, § 2(14)(H) (emphasis added).

Notably, Congress also endorsed the view of a medical association that "'partial birth' gives the fetus an autonomy which separates it from the right of the woman to choose treatments for her own body." *Id.* at § 2(14)(I).[3]

In addition to expressing a direct and compelling interest in protection of the partially-born fetus, the House Report on the Act explicitly states that the Act is intended to "draw a bright line that clearly distinguishes abortion and infanticide." Partial-Birth Abortion Ban Act of 2003: H.R. Rep. No. 58, 108th Cong., 1st Sess. (April 3, 2003) ("House Report") at 21. Congress asserts that the governmental interest in protection of the unborn child "becomes compelling as the child emerges from the maternal body." *Id.* This is so because "[a] child that is completely born is a full, legal person entitled to constitutional protections afforded a 'person' under the United States Constitution" and "[p]artial-birth abortions involve the killing of a child that is in the process, in fact mere inches away from, becoming a 'person.'" *Id.*[4]

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[3]The Act quotes AMA Board of Trustees Fact Sheet on H.R. 1122, Brief of Amici Curiae Association of American Physicians and Surgeons et al. appendix, *Stenberg v. Carhart*, 530 U.S. 914 (2000) (99-830) available at WL 228448. *See* Partial-Birth Abortion Ban Act of 2003: H.R. Rep No. 58, 108th Cong., 1st Sess. (April 3, 2003) ("House Report") at 22 n.110.

[4] As Judge Straub noted,

> In addition to vindicating the right to life of those in the process of being born, the State has a compelling interest in protecting the line between abortion and infanticide – the second significant difference from the Nebraska

The House acknowledges that under *Roe v. Wade* and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), pregnancy termination is constitutionally protected, but then specifically asserts that, when the fetus has substantially emerged from the maternal b

> partial-birth abortion should not implicate this right because the pregnancy ended once the birth process began and the right to terminate one's pregnancy by aborting one's unborn child does not include an independent right to assure the death of that child regardless of its location to its mother. Thus, the government has a heightened interest in protecting the life of the partially-born child.

House Report at 21-22.

Congress thus asserts a "heightened" and "compelling" interest in protection of the partially-born fetus – the fetus who has substantially emerged from the maternal body – that exists

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> statute. Congress, *inter alia*, found that partial-birth abortion 'blurs the line between abortion and infanticide,' Partial-Birth Abortion Ban § (2)(14)(O), 117 Stat. at 1206, and that failing to prohibit the practice would "coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life," *id.* § (2)(14)(N). There is undoubtedly a compelling state interest in preventing the killing of newborns. Infanticide, like suicide, is a "serious public-health problem," which the State has an interest in "studying, identifying, and treating its causes." *Glucksberg, 521 U.S. at 730.*

National Abortion Federation v. Gonzales, 437 F.3d at 313 (Straub, J., dissenting).

regardless of whether the fetus is "viable."[5] Because of this, any

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[5]The locational criteria of birth or partial-birth have definite constitutional significance, since birth is specifically recognized as a cognizable indicia by the plain language of the Constitution. U.S. Constitution, amend. XIV, § 1 ("All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.") In contrast, "viability" is a judge-made legal criterion arising out of the initial common law requirement that a child must be born alive in order to be the proper subject of wrongful death suits, which was expanded to include unborn children capable of live birth. "Viability" is, however, an increasingly irrelevant legal indicia even in its original context. Thus, for example, the trend is now to reject viability-based criteria in suits for wrongful death and to acknowledge such a cause of action at any stage of fetal development. *Illinois*: 740 Ill. Comp. Stat. Ann. 180/2.2 (Bender 2004) (any time during pregnancy); *Smith v. Mercy Hosp. and Medical Center*, 560 N.E.2d 1164, 1173 (Ill. App. Ct. 1990) (noting that wrongful death action could be maintained on behalf of a non-viable, stillborn fetus); *Louisiana*: *Johnson v. Southern New Orleans Light & Traction Co.*, Docket 9048 (La. App. Orl. Cir. Dec. 10, 1923) (rejecting viability standard for wrongful death of unborn child), *cited with approval* in *Danos v. St. Pierre*, 402 So.2d 633, 639 (La. 1981) (the holding in *Danos* was later codified as La. Civ. Code Ann. art. 26 (West 1999)); *Michigan*: Mich. Comp. Laws Ann. § 600.2922a (2004); *Missouri*: *Connor v. Monkem Co.*, 898 S.W.2d 89 (Mo. 1995), Mo. Ann. Stat. § 1.205 (2004); *Nebraska*: Neb. Rev. Stat. § 30-809 (Bender 2003); *South Dakota*: S.D. Codified Laws § 21-5-1 (2003), construed in *Wiersma v. Maple Leaf Farms*, 543 N.W.2d 787 (S.D. 1996) (interpreting amendment to wrongful death statute to apply throughout pregnancy); *Texas*: Tex. Civ. Prac. & Rem. Code §§ 71.001, 77.003, 71.0055 (2004); *West Virginia*: *Farley v. Sartin*, 466 S.E.2d 522 (W. Va. 1995) (interpreting wrongful death statute to apply throughout pregnancy). *See also Porter v. Lassiter*, 87 S.E.2d 100 (Ga. App. 1955) (recognizing wrongful death actions for unborn children after "quickening"); *66 Federal Credit Union v. Tucker*, 853 So.2d 104 (Miss. 2003) (same). *See also e.g.*, James Bopp & Richard Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 B.Y.U. J. Pub. L. 181, 246-83 (1989) (cataloging fetal rights in non-abortion contexts).

In the context of the criminal law, the federal "Unborn Victims of Violence Act of 2004," also known as "Laci and Conner's Law," recognizes that where a person assaults a woman and kills or injures her "unborn child" there is "a separate offense" for the harm done to the child regardless of

formula for analyzing the permissible limits of abortion regulation on behalf of the fetus based solely on the viability of the fetus is inapposite. Instead, the degree to which the Act burdens any abortion liberty must be balanced against the heightened and *compelling* interest in the protection of the fetus that has substantially emerged from the maternal body – thus, into the realm of constitutional personhood – and in securing a bright line between abortion and infanticide.

And, indeed, the Act proscribes conduct more closely akin to infanticide than to abortion. It applies only when the entire head or trunk-through-naval of the child have entirely emerged from the mother's body. That is, it applies only when the seat of intelligence and consciousness or when more than half of the body of the child are no longer "unborn," but have entered the sphere of human society and beyond the private enclosure of the woman's body.[6] The woman's liberty or privacy interest in abortion extends no further than the boundaries of her own body, and is at best only partially at issue when the fetus has substantially emerged therefrom.

It makes no sense whatsoever, under the circumstances that the Act proscribes, to treat the Act as solely a matter of

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whether or not the child is deemed "viable." 108 P.L. 212, 118 Stat. 568 (April 1, 2004).

[5]As Congress recognized, the need to draw a bright line between abortion and infanticide is especially urgent in the context of professional medical practice because it "confuses the medical, legal, and ethical duties of physicians to preserve and promote life" and "by undermining the public's perception of the appropriate role of a physician during the delivery process." Public Law 108-105, 117 Stat. 1201, §§ 2(14)(J) & (K). *See also* House Report at 22.

For a full discussion of the various governmental interests at stake in partial birth abortion, see James Bopp, Jr., & Curtis R. Cook, *Partial-Birth Abortion: The Final Frontier of Abortion Jurisprudence*, 14 Issues in Law & Med. 3, 25-41 (1998).

whether it indirectly burdens any abortion liberty. The Act necessarily implicates an at least equal consideration of whether it protects the liberties that attach to any born person and that trumps any secondary abortion liberty that might yet remain. Under the standard the courts below implicitly apply, the only proper consideration is the degree to which the Act might impede abortion even if only a fetal finger or toe still remained within the maternal body. In contrast, and quite reasonably, Congress deemed that when the most important or a more than substantial portion of the child's body is no longer within the "zone of privacy" encompassed by the outer boundary of the woman's body, a "bright line" has been passed in which the rights and interests of the child predominate over any maternal interest in abortion. As Judge Straub observed,

> The Act . . . prohibits only an "abortion" that occurs when a substantial part of the fetus "is outside the body of the mother." 18 U.S.C. § 1531(b)(1)(A). Once a fetus is "born," i.e. crosses the threshold between its mother's womb and the outside world, it is a "person" and entitled to all constitutional protections. *See Lewis v. Thompson*, 252 F.3d 567, 585-86 (2d Cir. 2001). Although under *Roe*, a fetus *in utero* is not a "person" entitled to the protections afforded by the Fourteenth Amendment, *Lewis*, 252 F.3d at 585, when the fetus leaves the body of its mother, it may not be "deprived . . . of life . . . without due process of law," U.S. Const. amend. XIV, § 1. At this point, the mother's right to privacy, autonomy, and bodily integrity are waning in importance, and the fetus's increases in strength. Just as viability is the point during the gestation of the fetus when the interest of the State in potential life become paramount, *see Casey*, 505 U.S. at 869, birth is

> the point during gestation when the State's "unqualified interest in the preservation of human life," *Washington v. Glucksberg*, 521 U.S. 702, 728, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997), and the child's right to life have sufficient force to restrict the privacy and autonomy rights of a woman. As the focus shifts toward the rights and interests of the fetus after substantial emergence from the maternal body, so does it shift away from consideration of the mother's abortion interest. When the fetus has substantially emerged from the mother to the degree described by the Act, pregnancy has already been substantially "terminated" and, to this degree, any right to terminate pregnancy obviated. Any abortion liberty still at stake is, at best, residual and cannot reasonably be deemed to trump every consideration of the government's interest in protection of the fetus or securing a clear line to guard against infanticide.

National Abortion Federation v. Gonzales, 437 F.3d at 311 (Straub, J., dissenting).

In the face of such a newly extant governmental interest, the standard for determining whether the Act creates an unconstitutional "undue burden" applied by the courts below and this Court in *Stenberg* does not directly apply to this case. However appropriate this analysis might be to determine whether a ban on partial-birth abortion applies when the ban does not exclusively apply to the fetus that has substantially emerged from the maternal body, it does not adequately address the situation here. The Act does not purport to draw a statutory line based on whether a woman is seeking abortion of the "potentiality of life." Rather, it draws a line based on whether the physician is seeking to kill by overt act a living fetus who

has in fact survived to live substantially outside the maternal body.

This is not a distinction without a difference. Regardless of whether a fetus is born alive as the result of an abortion, such a "fetus" is a full legal person, and the abortion liberty has no application in such a context. *See Roe v. Wade*, 410 U.S. at 156-57 (abortion liberty collapses if the fetus is a constitutional person); Unborn Victims of Violence Act of 2004, 108 P.L. 212, 118 Stat. 568 (April 1, 2004) (child born alive as result of abortion is a person and individual for the purpose of federal law). Intentional killing of a born "fetus" is a homicide – and whether the fetus is "viable" or not when purposely killed is no more relevant than whether a person is terminally ill when intentionally killed.

Thus, whether the fetus is within or without the maternal body is a crucial and legally significant factor quite independent of whether the fetus is "viable" or capable of surviving without the mother. Moreover, it is a factor that Congress specifically invoked in support of the Act. Yet it is also a factor that the courts below entirely and erroneously disregarded.

II. In Protecting Compelling Governmental Interests in the Partially Born Fetus, The Act Imposes No Significant Maternal Health Burden.

Any claim that the Act burdens the woman's abortion liberty because it does not include a "health exception" must be assessed in the context of the compelling interests in the protection of lives of substantially born children and protecting against infanticide clearly asserted by Congress, yet completely ignored by the courts below. As Judge Straub observed,

> At birth, we are, therefore, confronted with a unique circumstance where we must weigh the relative strength of the mother's privacy right,

> specifically her right to terminate her pregnancy in a manner that preserves her own health, against the emerging right of the fetus to live and the State's interest in protecting life. As *Stenberg* involved the destruction of a fetus while completely internal to the mother's body, I do not believe that it squarely confronted this issue of the conflict between these interests. Although I acknowledge that no court has held that there is a special constitutional standard of protection for the fetus in the process of being born, a woman's right to terminate a pregnancy has never extended to the destruction of a child during parturition. *See Roe*, 410 U.S. at 117 n.1 (stating that the Texas parturition Statute was "not attacked"). We should consider independently whether providing an unknown number of women a marginal health benefit outweighs both the fetus's emerging right to life and the State's interests in protecting actual and potential life.

National Abortion Federation v. Gonzales, 437 F.3d at 311-12 (Straub, J., dissenting).

Your Amicus defers to Congress's judgment that no health exception to the Act is medically needed. But even if this Court deems that some maternal health interest is at issue, the Court should go no further than to hold that a health exception is necessary only when the failure to provide one would impose a significant health risk on women if the Act would go into effect. *See Casey*, 505 U.S. at 880. Such a standard comes closer to appropriately balancing the comparative values at stake in adjudication of the Act than the court of appeals' conclusion that any health risk, no matter how insignificant, requires inclusion of a health exception whenever "substantial

medical authority" supports the medical necessity of the prohibited procedure. *Carhart v. Gonzales*, 413 F.3d at 770.

Put another way, in the context of the Act, because the child has been substantially delivered, the State's interest in protection of the child and in protecting against infanticide prevails over any less than significant health risk that might be asserted in favor of the abortion liberty. Even severe mental or physical harm to the mother could not justify killing a child fully born as the result of abortion. So a less than significant health risk to the mother should not justify direct killing of a child who has substantially emerged from the body of his or her mother.

In this regard, it must be noted that the Act applies to significantly fewer abortions – only those in which delivery of the fetus proceeds substantially beyond the vaginal introitus – than the Nebraska statute at issue in *Stenberg*. Obviously, most abortions do not involve a situation in which the child's head or trunk-to-navel will extend outside the maternal body.

Moreover, there are necessarily fewer possible risks to the mother as the result of the Act's ban on abortion both because the Act implicates fewer abortions and because there are fewer risks remaining from continued pregnancy after the fetus has been so substantially delivered outside the maternal body. Since alternative methods of abortion are also available, mechanical application of *Stenberg* to the Act is particularly inappropriate and any maternal health risks at stake as the result of the Act are significantly diminished.

Finally and crucially, any finding of a significant health risk would be particularly inappropriate in view of the Attorney General's construction of the Act to require specific intent, so that "unless a physician begins a particular abortion with a premeditated and specific intent to perform the abortion in the manner the Act forbids, the physician has not acted in violation of the statute . . . ." *Carhart v. Ashcroft*, 331 F. Supp. 2d at

1033. This means that the Act does not apply even if, as the physician proceeds with an abortion other than that proscribed by the Act, "the fetus's head gets stuck and must be crushed, or its contents removed, to complete the delivery." *Id.*

In the context of any claim that there exists a significant health reason for abortions forbidden by the Act, the Attorney General's construction also means that the physician must begin the abortion with specific intent to kill the fetus after the fetal head or trunk-to-navel has emerged from the maternal body *and* that there exists a significant health risk to the mother to justify this procedure as the physician specifically intends it. The record below purports to demonstrate that there may be reasons to contemplate killing the fetus while in the process of emerging from the mother's uterus. However, your Amicus was unable to find any evidence in the record that demonstrates any specific "health" reason to deliberately plan a procedure in order to kill the fetus with specific intent to do so only after the fetus has substantially emerged from the maternal body.

Any potential health risks to the mother must also be balanced against what Congress asserted is an interest in preventing this "gruesome and inhumane" procedure that causes pain that "the child will fully experience" as a result of the procedure. Public Law 108-105, 117 Stat. 1201, §§ 2(14)(L) & (M). *See also* House Report at 22-23. The pain suffered by the substantially born child as the result of the partial-birth procedure cannot be entirely discounted, as a matter of constitutional law, in face of less than substantial health risks to the child's mother.

It follows that an enhanced and compelling governmental interest in protection of partially born fetus and in drawing a bright line to protect against infanticide, coupled with an interest in preventing pain to partially born children, renders the Act constitutional at least in the absence of the showing of a significant health risk to aborting mothers as the

result of the Act. This Court should defer to Congress's finding that no health risk is imposed by the Act. But even it finds that some risk exists, your Amicus could not discover any proof offered in the district court that there is a significant risk in the circumstances in which the Act actually applies sufficient to render the Act unconstitutional.

III. The Act Does Not Forbid Dilation and Evacuation Abortions.

The Act avoids encompassing dilation and evacuation (D&E) and other abortion procedures, in contrast to the Nebraska statute held unconstitutional in *Stenberg*, 505 U.S. at 938-45. The Act specifically forbids only

> (A) deliberately and intentionally vaginally deliver[ing] a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and
>
> (B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus[.]

18 U.S.C. § 1531(b)(1).

The Act's plain language penalizes only physicians who "deliberately and intentionally" deliver a fetus so that the fetal head or trunk-to-navel are outside the maternal body "for the purpose of performing an overt act" that purposely kills a fetus that has been partially delivered. Contrary to the district court, 331 F. Supp. 2d at 1034-37, the language of the Act cannot reasonably be construed to encompass dilation and evacuation (D&E) abortions.

As the district court recounts, the Attorney General has interpreted the Act to require specific intent to perform the procedure the Act prohibits:

> "Unless a physician begins a particular abortion with a pre-meditated and specific intent to perform the abortion in the manner the Act forbids, the physician has not acted in violation of the statute, even if it so happens, as he or she proceeds, that the fetus's head gets stuck, and must be crushed, or its contents removed, to complete the delivery." (Filing 161, Def.'s Br. at 87.) "In other words, a physician cannot violate the Act unless he or she forms a specific intent, before delivering the fetus, to perform an overt act in mid-delivery (at the specified anatomic threshold) that will kill the partially delivered fetus." (Filing 161, Def's Br. at 86.)

Carhart v. Ashcroft, 331 F. Supp. 2d at 1032.

The district court accepted this construction as authoritative and not inconsistent with the language of the Act. *Id.* The lower court also conceded that this construction meant that the Act could not apply to induction or spontaneous abortion procedures. *Id.* However, it continued to insist that the Act applied to D&E procedures and subsequently held it unconstitutional on this basis. *Id.* at 1034-36.

D&E contemplates fetal dismemberment and death while the fetus is within or almost entirely within the maternal uterus. *See Stenberg*, 530 U.S. at 924-27. It does not deliberately or intentionally involve partial delivery as described by the Act.

Moreover, any events that might lead to any alleged need to kill a fetus to complete delivery after a D&E abortion are events that simply *might* occur, but are not intentionally or

deliberately planned as part of these procedures, as the Act requires before liability will attach. Physicians remain free to disarticulate the fetus, cut the fetal umbilical cord, or compress or decompress the skull or abdomen or other fetal part that is obstructing completion of the uterine evacuation causing death precisely because they did not deliberately or intentionally partially deliver the fetus outside the maternal body for the purpose of killing the fetus when performing a D&E procedure.

The plain language of the Act and the Attorney General's construction thus belie the district court's construction. But even if the Act's language and intent remained ambiguous in this regard, its legislative history clearly contemplates that "alternative medical procedures," specifically including the D&E, would remain available in the wake of the partial-birth abortion ban the Act entails. House Report at 20.

It also cannot be reasonably argued that Congress intended to include D&E procedures within the Act because it failed or refused to amend the Act to specifically exclude them from its purview. The failure of a legislature to amend a law is no evidence of intent. Moreover, Congress might not have easily amended the Act to have more obviously excluded procedures like the D&E without also creating ambiguity or defeating the purpose of the Act.

The district court finally holds that the Act embraces D&E procedures because some physicians begin abortions with "dual intent":

> At 17 weeks, for example, Dr. Carhart, who does not then induce fetal demise by injection, either (1) extracts the fetus intact after puncturing and draining the skull (about 5% of the time) or (2) extracts the fetus in large pieces (about 95% of the time). In other words, Dr. Carhart always has the specific intent to do

> either a D&E or the banned procedure on a living fetus when he begins the abortion during this age range. But he does not know which procedure he will perform until he has performed it. In both circumstances, the intact fetal body past the navel may be outside the woman's body prior to the time the lethal act (reducing the skull or tearing the body) takes place.

Carhart v. Ashcroft, 331 F. Supp. 2d at 1034 (footnotes omitted).

The district court understands the Act to thus ban the D&E because "[t]he evidence shows that Carhart will sometimes deliver an intact living fetus past the navel outside the woman's body, but, performing a standard D&E, the fetal body is thereafter removed in pieces rather than intact . . . [which is] the hallmark of all D&E abortions." *Id.* at 1036.

This is true, but also irrelevant. What the district court describes here as a "D&E" abortion is defined by the Act to be a partial-birth abortion and is prohibited if the physician intended to preform this procedure at the outset, in accord with the Attorney General's construction of the Act.

For some reason, the district court seemed to regard fetal dismemberment as a per se constitutionally protected procedure even if the fetal body is, trunk-to-navel, outside the maternal body. But this is absurd. There is nothing constitutionally sacrosanct about fetal dismemberment. Indeed, the intra-uterine procedure that the district court apparently seeks to protect involves all the potential medical problems that partial-birth abortions are supposed to solve by avoiding intra-uterine instrumentation and the medical problems that it entails, yet it still ends up killing a fetus that has substantially emerged from the maternal body. It entails all the supposed problems of

the D&E while also encroaching on the State's compelling interest in protecting the life of the substantially born fetus.

The Act forbids intentionally performing any procedure to kill a fetus when it was intended from the outset to kill the fetus after the fetus has substantially emerged from the maternal body, whether this entails fetal dismemberment, piercing the fetal brain, or a lethal injection. No issue of "dual intent" is involved here. Because an unintended scenario is precluded by the Attorney General's construction of the Act to require specific intent, either the physician intends to perform a procedure from the outset that involves killing a fetus that has substantially emerged from the maternal body or does not. This is the difference between a D&E and a partial-birth abortion as defined by the Act, and so understood, the Act never forbids a D&E abortion.

CONCLUSION

For the reasons stated herein, the decision of the U.S. Court of Appeals for the Eighth Circuit should be reversed, and this Court should uphold the Partial-Birth Abortion Act of 2003.

Respectfully submitted,

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